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In the Supreme Court of the United States

OCTOBER TERM, 1986

THE LOUISIANA LAND AND EXPLORATION COMPANY,
PETITIONER

v.

TEXACO, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

Section 105 of the Natural Gas Policy Act of 1978, 15 U.S.C. 3315, establishes a maximum lawful price for "any first sale of natural gas, sold under any existing contract * * *, which was not committed or dedicated to interstate commerce on November 8, 1978." The question presented is whether this Section applies to gas sold in intrastate commerce under a pre-1978 warranty contract, which guaranteed the delivery of certain quantities of gas, but which did not commit any specific sources of gas to performance of the contract.

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Natural Gas Policy Act of 1978 (the NGPA or the Act), 15 U.S.C. 3301 *et seq.*, regulates the pricing of "first sales" of natural gas in both interstate and intrastate commerce. Title I of the Act establishes eight categories of natural gas production and specifies the "maximum lawful price" that may be charged for first sales in each category.

Under Louisiana law, this "maximum lawful price" in turn limits the value of the gas for purposes of calculating royalties payable by producers to landowners under Louisiana leases. See *Shell Oil Company* v. *Williams, Inc.*, 428 So.2d 798 (La. 1983).

The question here is whether Section 105 or Section 109 of the NGPA applies in calculating the royalties payable by respondent to petitioner. Section 105 defines the maximum lawful price that applies "to any first sale of natural gas * * *, sold under any existing contract or any successor to an existing contract, which was not committed or dedicated to interstate commerce on November 8, 1978" (15 U.S.C. 3315(a)). This price is the lower of the maximum lawful price for so-called "new gas" and "the price under the terms of the existing contract, to which such natural gas was subject on November 9, 1978" (15 U.S.C. 3315(b)(1)). Section 109 in turn establishes a ceiling price for natural gas "which is not covered by any maximum lawful price under any other section of this part" (15 U.S.C. 3319(a)). Section 109 applies inter alia to "natural gas which was not committed or dedicated to interstate commerce on November 8, 1978, and which was not subject to an existing contract on such day" (15 U.S.C. 3319(a)(3)).

Respondent Texaco, Inc., leases from petitioner Louisiana Land and Exploration Company (LL&E) land on which Texaco produces natural gas. Texaco's leases with LL&E provide that it will pay LL&E a royalty based on a percentage of the "fair" or "market" value of the gas produced. Pet. 4; see Pet. App. 4a-6a n.1. Prior to the enactment of the NGPA, Texaco, in an effort to market its natural gas, entered into long-term sales arrangements with Louisi-

ana industrial customers promising future intrastate gas deliveries (Pet. App. 23a).

Texaco's agreements with its industrial customers were in the form of "warranty contracts" rather than "dedication contracts." Under a "dedication contract," a producer agrees to furnish to a particular customer all gas produced from specified reserves, so that those reserves are said to be "dedicated" to the customer. Under a "warranty contract," by contrast, a producer warrants that he will deliver certain quantities of gas to the customer; the source of the gas is unspecified, and the producer may therefore fulfill his obligation from any source that he chooses. Pet. App. 16a-17a.[1]

Before the enactment of the NGPA, Texaco had used gas produced from the LL&E leases to satisfy its obligations under its warranty contracts with its Louisiana industrial customers (Pet. App. 29a). Texaco during that period had paid royalties to LL&E based on the warranty contract price that it received from those customers. When the NGPA was enacted in 1978, Texaco took the position that the "maximum lawful price" of the gas was to be calculated under Section 105 of the Act, and hence that the royalties it paid to LL&E should continue to be based on the warranty contract price that it received from its Louisiana customers. Texaco reasoned that the gas was "sold under" the warranty contracts (15 U.S.C. 3315(a)), which were in existence on the date the NGPA was enacted, and hence that the maximum lawful price of the gas was "the price under the terms of [those] existing contract[s], to which [the]

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[1] The Department of Energy estimates that about 6% of all "old" natural gas sold in intrastate markets in 1984 was sold under warranty contracts of the sort involved here.

natural gas was subject on November 9, 1978" (15 U.S.C. 3315(b)(1)). Pet. App. 17a.

2. Almost five years after the NGPA was enacted, on July 29, 1983, LL&E filed this action against Texaco in the Civil District Court for the Parish of Orleans, Louisiana (Pet. App. 25a). In its petition for damages, LL&E claimed that Texaco had underpaid royalties due LL&E under its leases (*id.* at 4a-6a n.1). LL&E argued that, whether or not the gas produced from the leased properties could be deemed to have been "sold under" Texaco's pre-1978 warranty contracts, that gas was not "subject to" those contracts within the meaning of Sections 105 and 109. This argument was based on the theory that gas is "subject to" a contract only if it is specifically dedicated or committed to performance of that contract; since Texaco's pre-1978 warranty contracts permitted Texaco to satisfy its contractual obligation by using any gas of its choosing, LL&E argued that none of the gas at issue was "subject to" those contracts. LL&E therefore contended that the "maximum lawful price" for the gas was not the Section 105 price, but rather was the higher Section 109 price, which applies to intrastate gas "which was not subject to an existing contract on [November 8, 1978]" (15 U.S.C. 3319(a)(3)). Pet. App. 18a.

On cross-motions for partial summary judgment, the Louisiana district court rejected a state commissioner's recommendation (Pet. App. 25a-30a) and ruled in favor of LL&E (*id.* at 22a-24a). The trial court acknowledged that Texaco's gas "was being 'sold under' contracts existing when the [NGPA] was adopted," but concluded that this fact alone "does not submit th[e] gas to the Section 105 limitation of price" (*id.* at 24a). According to the court,

the Section 105 limitation applies only when gas was " 'subject to' * * * an existing contract on the effective date of the [A]ct" (*ibid.* (quoting 33 U.S.C. 3315, 3319)). "Because of the flexibility of [Texaco's] warranty sales agreements, * * * [which] commit no particular gas to Texaco's customers," the trial court concluded that the gas at issue "was not 'subject to' any contract" and hence that "Section 109 regulates the price at which this gas could be sold" (Pet. App. 24a).

The state court of appeal affirmed, one judge dissenting (Pet. App. 15a-21a). Like the district court, the court of appeal ruled that Congress's use of the term "subject to" in Section 105(b), and again in Section 109, "necessarily qualifies the more general language 'sold under' " used in Section 105(a) (Pet. App. 19a). According to the court of appeal, "[t]he term 'subject to,' in its ordinary sense, means 'subordinate to' or 'governed or affected by' " (Pet. App. 19a, quoting *Black's Law Dictionary* 1278 (5th ed. 1979)). Based on this reading of the statute, the court concluded that "the gas in question was [not] subject to an existing contract at the time of the NGPA's enactment" and hence that "Section 109 of the NGPA regulates the ceiling price for the gas" (Pet. App. 20a).

The state supreme court reversed, three justices dissenting (Pet. App. 4a-14a). Relying on a decision by the federal district court in *Amoco Production Company* v. *Hodel*, 627 F. Supp. 1375 (W.D. La. 1986), vacated on other grounds, No. 86-4168 (5th Cir. Apr. 29, 1987), the supreme court held that Congress "did not intend to distinguish between warranty and dedication contracts in establishing the price ceilings of Section 105" (Pet. App. 9a).

The court reasoned that LL&E's gas was clearly "sold under" Texaco's pre-1978 warranty contracts, and it held that the gas was therefore "governed by the maximum lawful price in Section 105," which the court deemed to "ha[ve] precedence over Section 109" (Pet. App. 10a). The court rejected LL&E's argument that "the term 'subject to' in Section 109 is * * * synonymous with 'dedicated to,'" concluding that the former term simply reflected Congress's understanding in 1978 that "all old gas in production would be the subject of a contract" (*id.* at 10a & n.12). The Louisiana Supreme Court accordingly held that Texaco had properly computed LL&E's royalties by reference to the actual contract prices that Texaco received from its Louisiana customers.[2]

DISCUSSION

The decision of the Louisiana Supreme Court concerns a novel issue of statutory construction—whether Section 105 of the NGPA applies to intrastate gas delivered under pre-1978 warranty contracts. This question has not previously been addressed by this Court, by any federal court of appeals, or by any other state supreme court. The Federal Energy Regulatory Commission, the federal

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[2] Three justices dissented, two of whom assigned reasons (Pet. App. 11a-14a). Justice Calogero expressed the view that Section 105 did not apply because the gas at issue was not "dedicated" to Texaco's contracts with its industrial customers and hence that the gas was not "subject to" those contracts within the meaning of Sections 105 and 109 (Pet. App. 11a-14a). Justice Dennis stated that he "agree[d] basically with the statutory construction" advanced by the majority, yet dissented on the ground that summary judgment was inappropriate (*id.* at 14a).

agency responsible for implementation and enforcement of the NGPA, has likewise had no occasion as yet to express its view on this issue. Under these circumstances, we believe that review by this Court would be premature at this time and accordingly suggest that the petition for a writ of certiorari should be denied.

1. As petitioner implicitly acknowledges, the decision of the Louisiana Supreme Court in this case does not conflict with any decision of this Court, or with any decision of any other court. Indeed, apart from the Louisiana courts below, the only other court in the country that has ever addressed the question presented here is the United States District Court for the Western District of Louisiana in *Amoco Production Co.* v. *Hodel*, 627 F. Supp. 1375 (1986).[3] That decision, however, was recently vacated by the Fifth Circuit on jurisdictional grounds. *Amoco Production Co.* v. *Hodel*, No. 86-4168 (Apr. 29, 1987).[4]

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[3] In *Amoco Production*, the Secretary of the Interior was in a position similar to that of LL&E, and the Secretary argued that Section 105 should not apply to limit royalties payable to the United States as lessor under pre-1978 warranty contracts involving natural gas produced from federal lands. The district court rejected the Secretary's argument that Section 105 does not apply to natural gas sold pursuant to warranty contracts (627 F. Supp. at 1378), but nonetheless ruled against the oil company's claim that it had overpaid royalties to the United States. The court reasoned (*id.* at 1378-1380) that the government's royalties under the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, should not be limited by the price agreed to by a producer in a warranty contract, notwithstanding Section 105 of the NGPA.

[4] In reversing the district court, the Fifth Circuit agreed with the Secretary's threshold contention that the oil company's lawsuit had the primary objective of recovering money

As a result, the question presented here is quite literally one of first impression outside of the Louisiana state court system.

We think that further review of the question presented is quite unnecessary at this juncture. As we have noted, the *Amoco Production* case, which raises the Section 105 issue and to which the Secretary of the Interior is a party, will soon be initiated in the Claims Court, with appellate venue lying in the Federal Circuit.[5] A diversity action raising the issue between private parties is also pending within the Fifth Circuit. See *Shelton* v. *Exxon Corp.*, No. H-83-1575 (S.D. Tex. filed March 1, 1983). Finally, although no litigation raising the Section 105 issue is currently pending in the Texas state courts, an action between private parties could well be heard by those courts in the future, creating the possibility of a conflict between the Texas and Louisiana Supreme Courts.[6] This Court has often remarked upon "the

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damages in excess of $10,000 from the United States, and hence that exclusive jurisdiction of the suit lay in the Claims Court under the Tucker Act, 28 U.S.C. 1346(a)(2), 1491(a). The court of appeals accordingly vacated the district court's judgment with instructions to transfer the case to the Claims Court.

[5] In the Claims Court litigation, the Secretary of the Interior will be advancing the contention, contrary to the holding of the Supreme Court of Louisiana, that Section 105 does not apply to warranty contracts of the sort involved here. The Secretary thus shares petitioner's view that the decision below is incorrect. The Secretary's view of the merits, however, does not affect his judgment that review by this Court would be premature now.

[6] The Texas Supreme Court, like the Louisiana Supreme Court, has adopted the rule that the "value" of natural gas, for the purpose of adjudicating natural gas royalty disputes

wisdom of allowing difficult issues to mature through full consideration by the courts of appeals" (*E.I. DuPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.26 (1977)). We do not believe that the question presented here is of such pressing and exceptional importance as to warrant an exception from that rule.

2. Petitioner suggests (Pet. 14-15) that immediate review by this Court is appropriate because of a supposed conflict between the decision of the Louisiana Supreme Court and "the views of those in the federal government responsible for administering the Natural Gas Policy Act." No such conflict in fact exists. Although the Interior Department's Board of Land Appeals in the *Amoco Production* case did adopt a construction of Section 105 at odds with that of the Louisiana Supreme Court (see Pet. 15), the Board of Land Appeals is not an agency responsible for administering the NGPA. The Federal Energy Regulatory Commission is the sole federal agency responsible for administering that statute; the role of the Interior Department in this context is confined to its status as the federal agency responsible for looking after federal property interests in certain public lands.

The Federal Energy Regulatory Commission, moreover, has never had occasion to address the question whether Section 105 of the NGPA applies to warranty contracts of the sort involved in this case. Petitioner refers (Pet. 14-15) to a pair of

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as a matter of state law, may not exceed the maximum lawful price of the gas under the NGPA. *See Exxon Corp.* v. *Middleton*, 613 S.W.2d 240, 246 & n.5 (Tex. 1981).

letter opinions drafted by FERC's General Counsel,[7] but such letter opinions do not amount to a formal construction of the statute by the Commission. Indeed, as both letter opinions make explicit, the interpretations expressed therein reflect only the views of the General Counsel at that time. See Pet. App. 51a ("the views expressed here are mine, as General Counsel, and do not bind the Commission in any manner"); *id.* at 58a (same). See generally 18 C.F.R. 385.1901(g)(6) ("An interpretation provided by the General Counsel is given without prejudice to the Commission's authority to consider the same or like question and to issue a declaratory order or to take other action which has the effect of rescinding, revoking, or modifying the interpretation of the General Counsel.").

An interpretative rule promulgated by the Commission under the NGPA, unlike an informal opinion rendered by its General Counsel, has general applicability and effect, is the product of a rulemaking proceeding, and requires a vote of the Commissioners. See 18 C.F.R. 385.1901, 385.1903. To date, the Commission has not had occasion to address the question of statutory construction that is implicated by this case. The Commission informs us, moreover, that it would be contrary to its normal practice to address that question when it arises, as here, in the context of a state-court action to recover royalties alleged to be due under state law, rather than in a federal regulatory context over which the Commission has jurisdiction.

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[7] Neither of the two opinion letters, which were prepared in 1982 and 1980 by different individuals, directly concerned the royalty implications of Section 105. See Pet. App. 46a-59a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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